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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1527

FRANK D'AMATO and RICHARD ZITO,
Petitioners,

—v.—

UNITED STATES OF AMERICA,
Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Frank D'Amato and Richard Zito pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, entered on March 14, 1974, which affirmed judgments of conviction previously entered against the petitioners in the United States District Court for the Southern District of New York.

Opinion Below

The Court of Appeals affirmed in an opinion dated March 14, 1974, *United States* v. *D'Amato*, — F.2d —. The opinion of the Court of Appeals is reproduced as Appendix A to the Petition for a Writ of Certiorari which has already been filed by the co-defendant-co-appellant Philip Abramo, *Abramo* v. *United States*, No. 73-1509, October Term, 1973.*

* This Petition follows closely, but more concisely, the *Abramo* petition. No different facts are set forth and no different issues are raised.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was filed on March 14, 1974.

Questions Presented for Review

1. Were petitioners deprived of a fair trial and their right to secure the attendance of witnesses by the refusal of the trial court to compel the government to produce or reveal the identity of a paid, registered informant where:
   a) The informant was intricately involved in the transactions which formed the basis for the government's trial proof;
   b) The bulk of the government's trial proof consisted of alleged acts and declarations of an unavailable co-conspirator in the absence of petitioners, but in the joint presence of the informant and an undercover narcotics agent;
   c) Certain of the alleged statements made by the informant at a number of such meetings were repeated to the jury by the direct testimony of the narcotics agent;
   d) Portions of one such meeting, including statements of the informant, were tape recorded and played for the jury as part of the government's case.
2. Should the trial court, at least, have convened an *in camera* hearing, as alternatively requested by the defense, to determine whether the informant possessed information which would have been of value to the defense?

3. Did the government fail to adduce sufficient evidence upon which petitioners could properly be convicted beyond a reasonable doubt as having been knowing participants in the alleged conspiracy?

4. Has the Court of Appeals reduced the standards of proof in conspiracy cases below proper evidentiary and constitutional requirements by:

   a) permitting the declarations of a co-conspirator to be used for the purpose of determining whether a defendant was a member of an alleged conspiracy;

   b) permitting the concepts of "verbal act" and "statements against penal interest" to practically eliminate traditional requirements of confrontation and cross-examination?

5. Were petitioners deprived of their right to a jury trial and were the jury qualification requirements of 28 U.S.C. § 1865 violated by the refusal of the trial court to declare a mistrial when, in the midst of deliberations, it was revealed that one of the jurors was a chronic claustrophobic who had suffered acute attacks of claustrophobia during deliberations, to the point of requiring temporary hospitalization?

Constitutional and Statutory Provisions Involved

This case involves the Due Process clause of the Fifth Amendment, as well as the rights of a defendant to an impartial jury, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, as guaranteed by the Sixth Amendment to the United States Constitution.

This case also involves the following provisions of the United States Code: 21 U.S.C. § 841(a)(1) and (b)(1)(A) [prohibiting possession of controlled substances with intent to distribute same], 21 U.S.C. § 846 [prohibiting attempt

or conspiracy to commit a drug offense], and 28 U.S.C. § 1865 [Qualifications for Jury Service].*

Statement of the Case

Introduction

Petitioners and Philip Abramo were named as defendants in a two count indictment filed in the Southern District of New York. The first count charged a conspiracy, commencing February 1, 1973, to possess and distribute heroin in violation of 21 U.S.C. § 846. The second count charged a sale of heroin to a Federal undercover agent on February 20, 1973, in violation of 21 U.S.C. § 841(a)(1).

A fourth individual, Frank Burdieri, was named as a conspirator. He met a violent death prior to indictment. The bulk of the trial proof concerned Burdieri's individual dealings and conversations with a Federal undercover agent and with a paid, registered informant of the Bureau of Narcotics and Dangerous Drugs (BNDD).

The three defendants were tried together before a jury. At the conclusion of the evidence, the trial Court dismissed the substantive (sale) count against Abramo, and the jury thereafter convicted him as to the conspiracy charge.

Petitioner D'Amato was convicted as to both counts. Petitioner Zito was convicted as to the conspiracy. Due to the indisposition of a juror, the trial was terminated before the jury was able to reach a verdict as to the substantive charge against Zito.

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* The Constitutional and Statutory provisions are set forth as Appendix B of the Petition for a writ of certiorari filed by the co-defendant Abramo, *Abramo* v. *United States*, No. 73-1509, October Term, 1973.

1. The Basic Facts *

Following three weeks of negotiations, one Frank Burdieri sold a half kilogram of heroin to an undercover team comprised of a paid, registered informant and a narcotics agent. For a few minutes about an hour prior to, and then immediately after the sale, Burdieri was observed to be in the company of petitioners D'Amato and Zito. This was the first time these two men were seen during the facts of this case. Zito never again appears in the facts. No one overheard the conversation among the three men and nothing was seen being transferred from D'Amato or Zito to Burdieri. However, following the sale, D'Amato was seen discarding an envelope which had contained the purchase money given by the agent to Burdieri.

After several more meetings with the agent and the informant, Burdieri was scheduled to make a second sale, a month after the first. On the appointed day, he met briefly with the agent, and then departed, promising to return shortly with the heroin. In fact, he never returned, and, a few days later he terminated his relationship with the agent and the informant.

On the day of the allegedly aborted sale, upon leaving the agent, Burdieri was followed by surveillance agents to a coffee shop in uptown Manhattan where he had some pie and coffee. (All of the other events in the case had occurred in lower Manhattan.) Meanwhile, an automobile in which petitioner D'Amato was a passenger and Philip Abramo was the owner-driver, pulled up outside the coffee shop. This was D'Amato's second and last appearance in the facts. It was Abramo's first and last appearance.

As D'Amato and Abramo exited the car, Burdieri left the coffee shop and joined them, and the three men entered the car and drove off.

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* Except where noted, these facts are set forth in the opinion of the Court of Appeals, Appendix A, Abramo petition.

The car was then observed to "square" several blocks in Manhattan at what were described as irregular speeds, and then headed for Queens.

While on a Queens highway, the car, at one point, was travelling at approximately 75 miles per hour, and suddenly exited the parkway. Burdieri was dropped off at a Queens race track, and D'Amato was dropped off across the street from a pizza shop, where he purchased a pizza, and then walked a mile or so to his home (A. 393-6, 418).* In the meanwhile, Abramo returned to Manhattan and parked the car.

All of the prosecution's trial testimony came from the undercover agent and from visual surveillance agents. Despite defense demands, the informant was never produced or identified. Burdieri was not available to either side since he had met a violent death prior to the instant indictment.

Petitioner D'Amato testified in his own behalf and gave an innocent explanation for his meetings with Burdieri and for his later possession of the envelope in which the purchase money of the first sale had been contained.

Predicated upon the facts recited above, as well as certain statements made to the agent and to the informant by Burdieri, the Government charged Abramo, D'Amato and Zito with the first sale and with conspiracy.

2. Critical Facts as to The Missing Informant and the Burdieri Statements.

As noted *supra*, the Government refused to produce or identify the paid and registered informant. Additionally, the trial Court refused to conduct a hearing, *in camera*

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* The stop at the Pizza Shop is not noted in the Court of Appeals' opinion.

or otherwise, as to what, if any value the informant might have for the defense (A. 196, 363-7).

Although specified at length in our appellate brief, the Court of Appeals opinion fails to properly articulate or set forth the nature and extent of the informant's involvement in the facts of this case, particularly as concerns his relationship to Burdieri, his presence at each significant meeting, his concededly purposeful introduction of misstatements of fact in a tape recorded conversation, his private meetings with Burdieri, and his witness to Burdieri's so-called "verbal acts", "conspiratorial declarations" and "statements against penal interest" which were used to make the case against the defendants. Additionally, the Court of Appeals fails to note that, during his conversations with the agent and with the informant, Burdieri made statements exculpatory of the defendants.

* * * * *

On January 31, 1973, the informant introduced the agent to Burdieri, and the three men remained together for approximately two hours. The trial version of their conversation came solely from the agent—no recording having been made. During the course of that discussion, Burdieri allegedly agreed to obtain heroin for the agent, and *the informant* introduced the name of petitioner D'Amato as a possible source. Burdieri allegedly responded that D'Amato did *not* deal in the relatively small quantities sought by the agent (A. 133). Burdieri continued that he had other connections, including "a Cuban on West 81st Street" (A. 133) and one "Joe Beck" (A. 134). The trio then went in search of those two individuals, but met with no success (A. 134-5).

On February 15, 1973, the agent *not* being present, Burdieri gave a sample of heroin *to the informant,* who later turned it over to the agent. We have no report as to the conversation which transpired between Burdieri and the

informant at that time, except that this was a sample of heroin which had become available to Burdieri (A. 138-40).

On February 16, 1973, the agent and the informant again met with Burdieri. Again, the conversation was unrecorded, and again Burdieri allegedly discussed his sources of supply, but made no reference to any of the defendants in this case. The meeting concluded with an agreement as to the terms of the first purchase (A. 138-40).

On February 20, 1973, Burdieri met with the agent and the informant prior to, and then, of course, during the transfer. Again the conversation was not recorded. According to the agent, during the pre-transfer meeting, Burdieri claimed he was going "to meet his people" in order to obtain the heroin (A. 144-5, 149). At that point, other agents observed Burdieri briefly meet with D'Amato and Zito. Thereafter, Burdieri went off *alone* and disappeared for 45 minutes, returning at the end of that time carrying a bag of heroin (A. 216-7, 308, 374-6). The trial proof does not indicate where he had obtained it. During the transfer, itself, Burdieri allegedly responded affirmatively to the agent's question: "Do you have to meet your people right away to give the money back to them?" (A. 157). It was thereafter that Burdieri went to again meet Abramo and Zito.

On February 23, 1973, a telephone conversation between the informant and Burdieri was recorded. The purpose of the call was to set up a meeting later in the day. The transcript of the conversation was introduced into evidence, and, although it sheds no light as to the identity of Burdieri's suppliers, it does show the close relationship which existed between Burdieri and the informant (Gov. X. 20; A. 817a).

A meeting among Burdieri, the informant and the agent on the afternoon of February 23rd produced the only sub-

stantive conversation which was recorded—the agent was wearing a kel transmitter, but only a portion of the recording was decipherable (Gov. Ex. 24; A. 819). The trial evidence as to the remainder of the conversation comes only from the agent's testimony. The transcript shows that the agent introduced the name of petitioner D'Amato into the conversation, and Burdieri denied knowing whether D'Amato was dealing in narcotics, e.g., "Yeah; I don't know if he's in the business any more to be honest with you" (A. 280-1; *see also* A. 221, 223). Additionally, Burdieri agreed with the agent that his source, in fact, was one Joe Beck (A. 820-1; *see also*, A. 199). There is no other evidence in the case further identifying Beck or linking him in any way to the defendants.

The conversation of February 23rd continued with the agent recorded as stating to Burdieri: "The way they work is beautiful. You went right there, you gave them the money, and you came back—" Burdieri's response is indicated on the Government transcript as "inaudible" (A. 828). The agent testified that the question was posed as a surmise to Burdieri, and that Burdieri responded affirmatively (A. 168).

Finally, during the same conversation, the *informant* introduced petitioner Zito's name into the conversation, but the effort came to naught (A. 829; see also, A. 236, 241).

3. Critical Facts Concerning the Claustrophobic Juror

The opinion of the Court of Appeals unfortunately summarizes the facts concerning the claustrophobic juror to the point of excising the tenor and substance of what occurred (13a). We are left with no recourse but to set forth those facts at length.

The jury commenced its deliberations at 3:40 P.M. on July 30, 1973 (A. 734). At 3:55 P.M. (A. 735-736), the Court received the following note from the jury: "Are we

being impounded until we arrive at a decision or go home tonight * * *?" The court responded that the jury would deliberate until 10 P.M., at which time they would be sequestered (A. 736). Shortly after 9:20 P.M., while considering another jury request (A. 741), the court inquired as to whether the jury had reached any verdict, and the foreman announced that verdicts of guilty as to both counts had been found as to the petitioner D'Amato (A. 744). Then, on its own motion, the Court shifted jury deliberations to an air-conditioned room (A. 745).

At 10:10 P.M., following the reading of various items of testimony to the jury (A. 748), they were sent back to the jury room to continue their deliberations; however, at 10:15 P.M. (A. 751), the following occurred:

> "The Court: Taking them in the order in which they are marked, this juror here feels ill enough to want to see a doctor, so I am going to suspend the proceedings at this time so that juror No. 2 can see the doctor, and I will answer your question when we are able to proceed.
>
> "Under the circumstances, I don't see anything to be gained by further discussing this tonight here in the courthouse, so I am going to direct the Marshal to take you to a convenient hotel, and in the meantime, I want to get medical treatment for the juror who doesn't feel well, and then we will continue our deliberations tomorrow."

However, the court then decided to discuss a legal issue which had been raised by the jury, and inquired of the afflicted juror as follows, "Mr. Killeen, does it bother you if we discuss this question?" (A. 752). The record does not reveal any response on the part of the juror, and the court went on to discuss the legal issue. Thereafter, the record notes the court as suddenly stating, "All right. The ambulance is going to come right away, Mr. Killeen" (A. 753).

On the following morning, counsel and the court were advised that the juror was suffering from claustrophobia (A. 755), and the court stated that it had been arranged for the jury to continue its deliberations *in a courtroom*, rather than a normal jury room. Defense counsel requested that the court inquire as to the qualifications of the juror to continue (A. 755). The court then ascertained from the juror that the juror would "feel better" if deliberations were conducted in a courtroom, and the questioning of the juror continued as follows:

> The Court: "Do you feel you could do it? It is the same as this. You can walk around, you can do whatever you want. It would be only for you jurors.
>
> The Juror: "That isn't the only thing that bothers me. If I didn't have to ride on these elevators, if I could just walk upstairs, *because as soon as I got in the elevator again this morning it all came back.*
>
> The Court: "This, of course, is the 6th floor. If we take you up now to the 7th floor where there is a big room like this one here, the marshals then could stay at one end and the other end so that nobody could get in there, and you could wander around as you like up there. Do you feel you could perform your duties then?
>
> The Juror: "I will certainly *try;* your Honor.
>
> The Court: "And if you have any difficulty at all, I want you to report it immediately, and if during the deliberations Mr. Killeen indicates any discomfort or anything that in any way bothers him, I want you to stop and then come down and have it reported to me, and I will come up to the 7th floor.
>
> The Juror: "*All along I used to walk up and down the 6 flights and I had no trouble when I did that* [*]. But now I feel like I am confined" (A. 756-757) [emphasis added].

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* There is thus a clear statement that the juror's claustrophobia was a problem that had afflicted him from the outset of the trial and not merely one which arose during deliberations.

The judge permitted the juror to walk up the one flight of stairs, and the jury retired to continue its deliberations at 10:07 A.M. (A. 757-758). Once the jury had retired, defense counsel moved for a mistrial based upon the juror's condition, but the application was denied and an exception was noted (A. 759-761).

At 11:15 A.M., the jury was back in the courtroom to report its verdict finding the co-defendant Abramo and petitioner Zito guilty as to Count 1. It had not yet agreed as to the petitioner Zito on Count 2 (A. 761-762). The court then inquired as follows:

> The Court: "All right? Now, Mr. Killeen, how do you feel during the course of your deliberations up here in this room?
>
> The Juror: *"Nothing seems to make me feel any better. I just feel confined.*
>
> The Court: "Do you feel that it interfered with your judgment in any way?
>
> The Juror: "I do, your Honor. *To be honest, I would vote either way just in order to get out.*
>
> The Court: "Well, I am afraid you have a mistrial here" (A. 762) [emphasis added].*

When the prosecutor sought to probe the matter further, the Court responded, *inter alia*:

> "The juror has clearly indicated unequivocally that the pressure on him was so much that he would have voted either way.
>
> * * * * *

---

* That the juror's state of desperation was even worse than revealed by the transcript is shown by the colloquy at the time of sentence in which it was agreed that the stenographer had failed to record certain of the vital aspects of the incident (A. 780, *et seq.*).

"I wouldn't care less who you consult with, and even if you come up and tell me that they objected to this violently, I wouldn't be moved at all. The juror has clearly indicated, and *even observing him, and if you observe him you will see that he is in a state of mind that he had to be nudged to direct his attention to me, and last night I noticed his demeanor also. The man is in an uncomfortable position and he has indicated clearly that he would vote any way in order to get out of here today. He just can't stand this any longer. Is that a fair statement?*

Juror No. 2: *"It is the God's truth, your Honor"* (A. 762-763) [emphasis added].

It was only after it was inadvertently indicated to the juror that he could still save the guilty verdicts by stating that he was of sound mind when he rendered them, that he shifted his position by stating, in response to an inquiry of the court, that ". . . it [the verdicts] happened earlier, and the feeling wasn't as strong in me as it is now" (A. 764). Based on that, and based upon a perfunctory questioning of the other jurors,* the Court reversed its position and received their verdict.

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* The Court: "All right. Now let me ask you this. You jurors are better able to answer this question than I am. Did any of you, everyone except Mr. Killeen, coerce, persuade, or in any way cause him to come to a verdict on these counts as far as Abramo is concerned and Zito is concerned—as to the first count? (no response)

The Court: "Mr. Foreman, did you discuss anything with him or cause him to change or make up his mind?" (A. 767)

All of the jurors merely replied, "No."

Reasons for Granting the Writ

I.

Petitioners were deprived of a fair trial and of their constitutional right to secure the attendance of witnesses by the refusal of the trial court to compel the government to reveal the identity of the paid informant. At least, the trial court should have conducted an *in camera* hearing to determine whether the informant possessed information which would have been of value to the defense.

Repeated efforts by the defense to learn the identity of the paid, registered informant were denied by the trial court (A. 196, 362-367), as were efforts to secure an *in camera* hearing on the issue (A. 363).

As shown *supra,* at pp. 7-9, the informant was intricately involved in practically every aspect of this case. He stood in a position to contradict, correct or supplement the version of events given by the narcotics agent.

The decisions of this Court and of other Federal Courts of Appeal make clear that, under these circumstances, the petitioners were entitled to the production or, at least, identification of the informant as a matter of Sixth Amendment constitutional right, and as a matter of sound administration of justice in the Federal Courts. *Roviaro* v. *United States,* 353 U.S. 53, 59 (1957); *Branzburg* v. *Hayes,* — U.S. —, 92 S.Ct. 2646, 2664 (1972); *McCray* v. *Illinois,* 386 U.S. 300, 309-310 (1967); *Smith* v. *Illinois,* 390 U.S. 129 (1968); *Alford* v. *United States,* 282 U.S. 687 (1931); *United States* v. *Skeens,* 449 F.2d 1066, 1071 (D.C. Cir., 1971). See, e.g., *Lopez-Hernandez* v. *United States,* 394 F.2d 820 (9th Cir., 1968); *United States* v. *Roberts,* 388 F.2d 646, 648-649 (2d Cir., 1968); *Gilmore* v. *United States,* 256 F.2d 565, 566-

567 (5th Cir., 1958); *United States* v. *Miramon*, 443 F.2d 361 (9th Cir., 1971); *United States* v. *Barnett*, 418 F.2d 309 (6th Cir., 1969).

See also: *Proposed Rules of Evidence for United States Courts and Magistrates*, Rule 510 (c)(2).

A more extensive treatment of the authorities is set forth in the petition for a writ of certiorari filed by the co-defendant Philip Abramo, *Abramo* v. *United States*, Docket No. 73-1509 at pp. 15-19.

II.

The Government failed to establish beyond a reasonable doubt that petitioners conspired with anyone to traffic in narcotics.

There is not an item of evidence in this case to the effect that the petitioner Zito saw, said, or did anything evidencing that he knew that Burdieri was involved in a plot to traffic in narcotics.

Although the petitioner D'Amato was seen discarding the envelope which had been used by the undercover agent to make the payment to Burdieri, D'Amato's trial testimony was that he had met Burdieri for the purpose of collecting a gambling debt, that Burdieri produced an envelope from which he removed an unspecified amount of cash, and then gave the envelope to D'Amato with the remainder of the cash which amounted to substantially less than the money paid by the agent.

As regards petitioner Zito, guilt can only be predicated upon a theory of guilt by association. As regards the petitioner D'Amato, we respectfully submit that his possession of the envelope was far from sufficient to convict him for knowing participation in a heroin conspiracy.

See: *Ingram* v. *United States*, 360 U.S. 672, 680 (1959); *Morrison* v. *United States*, 291 U.S. 82, 93 (1934); *United States* v. *Falcone*, 311 U.S. 205, 210-211 (1940); Concurring opinion of Mr. Justice Jackson in *Krulewitch* v. *United States*, 336 U.S. 440, 453-454 (1949); and *Scales* v. *United States*, 367 U.S. 203, 224-225 (1961). See also, the more extensive treatment set forth in the petition for a writ of certiorari filed by the co-defendant Abramo, *Abramo* v. *United States*, Docket No. 73-1509 at pp. 19-23.

III.

The Court of Appeals has reduced the standards of proof in conspiracy cases below proper evidentiary and constitutional requirements.

The Count of Appeals found as admissible, as against petitioners, Burdieri's so-called "verbal acts" and hearsay declarations for the purpose of establishing that Burdieri, on both occasions, was going to meet them for the purpose of consummating a heroin purchase, and for the purpose of establishing that they were knowing participants with him in these heroin transactions.

The bulk of the hearsay was admitted under the principle established by the Court of Appeals in *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2nd Cir., 1969), *cert. denied*, 397 U.S. 1028 (1970), where it was held that, if the trial Judge is satisfied that a *preponderance* of the independent evidence tends to establish a defendant's participation in a conspiracy, then all evidence in the case, including conspiratorial hearsay, is admissible for the purpose of establishing, beyond a reasonable doubt, that the defendant was, in fact, a member of the conspiracy.

This Court has never passed upon the *Geaney* principle, and petitioners respectfully submit that the *Geaney* principle is violative of the Sixth Amendment guarantee of

confrontation and cross-examination, and, additionally, violates the hearsay rule. See the criticism of the *Geaney* rationale in the dissenting opinion of District Judge Dooling (sitting by designation), in *United States* v. *Calarco*, 425 F.2d 657 at 661-665 (2nd Cir., 1970).

An analysis of this Court's recent holdings in *California* v. *Green*, 399 U.S. 149, 155 (1970), and *Dutton* v. *Evans*, 400 U.S. 74, 82, 89 (1970), leaves no doubt that the *Geaney* principle is, at least, of highly questionable constitutional and evidentiary validity.

See also the petition for a writ of certiorari filed by the co-defendant Abramo, *Abramo* v. *United States*, Docket No. 73-1509, at pp. 24-28.

IV

Petitioners were deprived of a fair trial by virtue of the fact that one of the jurors apparently suffered from claustrophobia throughout the trial and had an acute and hysterical attack of claustrophobia during the course of deliberations. The shadow thus cast upon the integrity of the jury's deliberations required a new trial merely by virtue of what was revealed. In any event, the defense was, at least, entitled to a full hearing with regard to the nature and effect of the juror's illness.

The facts are outlined in full, *supra*, at pp. 9-13.

Petitioners respectfully submit that the presence on the jury of a clearly claustrophobic juror who suffered acute attacks of claustrophobia during the course of deliberations, certainly violates the requirement of 28 U.S.C. § 1865 that one may not serve as a juror if he or she "is incapable, by reason of mental or physical infirmity, to render satisfactory jury service."

Moreover, the incapacity of the juror was such as to deprive petitioners of their Sixth Amendment right to a trial by jury. *Parker* v. *Gladden,* 385 U.S. 363 (1966); *United States* v. *Pleva,* 66 F.2d 529 (2nd Cir., 1933); *People* v. *Kurth,* 216 N.E. 2d 154 (Sup. Ct. Ill., 1966). See also, the more extensive treatment of the issue found in the petition for a writ of certiorari filed by the co-defendant Philip Abramo, *Abramo* v. *United States,* Docket No. 73-1509, at pp. 28-31.

CONCLUSION

For all of the above reasons, this joint petition for a writ of certiorari should be granted, the judgments of conviction should be ordered reversed, and the Indictment should be ordered dismissed; in the alternative, petitioners should be granted a new trial.

Respectfully submitted,

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D'Amato and Zito

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1509

PHILIP ABRAMO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-1527

FRANK D'AMATO AND RICHARD ZITO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that they were denied a fair trial because the district court refused to compel the government to reveal the identity of a paid informer; because the government failed to establish the existence of a conspiracy; because the court of appeals reduced the government's standard of proof below proper evidentiary and constitutional standards; and because one of the jurors was claustrophobic.

Petitioners were each charged in a two-count indictment with conspiracy to possess and distribute heroin, in violation of 21 U.S.C. 846, and with the possession and distribution of 487.27 grams of heroin, in violation of 21 U.S.C. 812, 841(a)(1), and 841(b)(1)(A). Following a jury trial in the United States District Court for the Southern District of New York, each of the petitioners was convicted on the conspiracy count. Petitioner D'Amato was also convicted on the possession and distribution count which was dismissed as to petitioner Abramo. The jury was unable to reach a verdict on this latter count as to petitioner Zito. The court sentenced petitioner Abramo to seven years' imprisonment and a fine of $15,000, petitioner Zito to five years' imprisonment and a $10,000 fine, and petitioner D'Amato to concurrent terms of eight years' imprisonment and fines totaling $50,000. The court of appeals affirmed (Pet. App. A).

The facts in this case are fully set out in the opinion of the court of appeals (Abramo Pet. App. A 3a-6a). Briefly, they show that on January 31, 1973, Special Agent Eugene McElroy of the Bureau of Narcotics and Dangerous Drugs (BNDD) went to a New York bar with a paid BNDD informant. This informant introduced Agent McElroy to Frank Burdieri[1] who told McElroy that he had connections through which he could obtain heroin. He mentioned petitioner D'Amato as one of his sources. Burdieri was unable to contact any of his sources on that evening but agreed to contact McElroy when he obtained the heroin.

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[1]Burdieri was deceased at the time of trial. Ten days after his arrest and before the other defendants were arrested, Burdieri disappeared. Two weeks later his body was found washed up on Silver Beach in the Bronx. Death was caused by a bullet in the back of the head following a severe beating.

On February 16, 1973, Burdieri offered Agent McElroy half a kilogram of heroin for $13,000. McElroy arranged to meet Burdieri on February 20. Prior to the meeting, McElroy placed $12,900 in marked bills in a plain white envelope, which he then marked for identification. On February 20, Burdieri, McElroy and the BNDD informant met once again. Burdieri required that McElroy "front" *(i.e.,* produce) the money in advance of delivery. He refused to do so, and Burdieri agreed to check with "his people" to determine whether the "front" was necessary. Burdieri then left McElroy's car and signaled a car carrying petitioners D'Amato and Zito to the curb. The three spoke for about ten minutes, after which Burdieri told McElroy that the transaction could take place in the next thirty minutes without the money being fronted. Burdieri was observed thirty-five minutes later walking with a brown paper bag wrapped in a newspaper. He was being followed by an Oldsmobile carrying petitioners D'Amato and Zito. McElroy received the heroin from Burdieri, who asked to be dropped off at a specified place so that he could give "his people" the money right away. Burdieri was dropped off where he requested and was picked up immediately by the same Oldsmobile. The car was followed by federal surveillance agents. Shortly thereafter the agents saw petitioner D'Amato throw from the car the premarked envelope which had contained the money for the heroin purchase. They immediately retrieved it. On February 23, 1973, McElroy, Burdieri and the informant met once again. McElroy elicited from Burdieri that following their last meeting he had immediately given the money to "his people."

On March 26, 1973, McElroy and Burdieri negotiated a further heroin purchase. Burdieri informed McElroy that "his people" normally dealt in four to five kilogram lots

but that he would be able to get McElroy half a kilogram for $12,500. He stated that his source would be the same people who provided the heroin on February 20. The following day McElroy gave Burdieri $28,000 for the purchase of heroin. They drove around while Burdieri counted the money, and then McElroy dropped Burdieri off at 23rd Street and 2nd Avenue, from which point Burdieri was under continuous surveillance. Burdieri went to 36th Street and 3rd Avenue, where he was met by petitioners D'Amato and Abramo. All three entered Abramo's car and shortly thereafter detected the surveillance units. The car, driven by Abramo, attempted to shake the surveillance units. In the ensuing chase Abramo succeeded in losing all but one of the surveilling cars. On March 29, 1973, Burdieri explained to McElroy that he had failed to return two days earlier with the heroin because he was followed to and during his meeting with "his people."

1. Petitioners contend that the district court should have required the government to disclose the identity of its informant[2], because, they assert, only the informant could confirm or contradict Agent McElroy's testimony, since Burdieri was no longer alive at the time of trial. The disclosure of the identity of the government's informer is a matter within the discretion of the trial judge. *United States* v. *Soles,* 482 F. 2d 103, 109 (C.A. 2). In exercising this discretion, he is guided by the test established by this Court in *Roviaro* v. *United States,* 353 U.S. 53, 60-61:

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[2]In the alternative, petitioners assert that the district court should have required the government to produce its informant for an *in camera* inspection by the judge and defense counsel to determine his involvement in the case. The court of appeals found that "On the facts before the district court, there was no need that a hearing be held to probe into what the paid informant might or might not have testified to" (Abramo Pet. App. A 12a-13a).

> Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.

The trial judge rejected petitioners' claim that the informer was "intricately involved" in the transactions in this case, thereby making his disclosure essential. The district court found that the informant did not participate in any critical phase of Burdieri's and McElroy's transactions (Tr. 327). The informant had no contact with petitioners, and his involvement in the case was very limited.[3] This case, in short, is wholly different from the situation in *Roviaro,* where the government informer was the sole participant, other than the accused, in the transaction charged (353 U.S. at 64). In these circumstances, the court of appeals correctly found "no abuse of discretion" in the trial court's ruling (Abramo Pet. App. A 12a).

2. The sufficiency of the evidence to establish the existence of a conspiracy is exhaustively discussed by the court of appeals, on whose opinion we rely. After review of the evidence (Abramo Pet. App. A 3a-6a), the court evaluated its sufficiency as to each of the petitioners. The court held that the sufficiency of the evidence relating to petitioners D'Amato and Zito "cannot be subject to serious doubt" (Abramo Pet. App. A 6a). With reference to petitioner Abramo the court stated: "Assessing the evidence, we cannot say that it is insufficient to establish Abramo's participation by a fair preponderance, once we draw reasonable inferences from it, as the jury was entitled to do" (Abramo Pet. App. A 9a).

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[3]In addition, the court of appeals found that the district court properly took the violent nature of Burdieri's death into consideration in not requiring the government to disclose the identity of its informant (Abramo Pet. App. A 12a).

While there was less evidence in the record relating to petitioner Abramo than to his co-petitioners, the facts did show that Abramo, together with D'Amato, picked up Burdieri after Burdieri told McElroy that he was going to meet his people to purchase heroin. Abramo was observed by the federal surveillance units as the operator of the car carrying D'Amato and Burdieri; Abramo was operating the car during the roundabout chase designed to evade the federal agents. These affirmative acts, taken in conjunction with Burdieri's statements against penal interest to McElroy are, as found by the district court and affirmed by the court of appeals, sufficient to support Abramo's conviction on the conspiracy count.

3. Petitioners erroneously contend that the court of appeals' reliance on its decision in *United States* v. *Geaney*, 417 F. 2d 1116 (C.A. 2), certiorari denied *sub nom. Lynch* v. *United States*, 397 U.S. 1028, lowers the standards of proof in conspiracy cases below established evidentiary and constitutional standards. Petitioners misconceive the nature of the court's holding in *Geaney*, which was simply that "* * * [the judge] must satisfy himself of the defendant's participation in a conspiracy on the basis of the non-hearsay evidence." 417 F. 2d at 1120. Thus, in *Geaney* the court held that the trial judge must determine, at the close of the evidence, whether the prosecution has proven participation in the conspiracy "by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances." *Ibid.* The trial judge, since he is not the trier of fact and is considering the issue solely for purposes of determining suffi-

ciency of the evidence for submission to the jury, need not be satisfied beyond a reasonable doubt.[4]

The evidence in this case, exclusive of the Burdieri statements, was, as found by the court of appeals (Abramo Pet. App. A 6a-11a), sufficient to permit the district court to be satisfied of petitioners' participation in the conspiracy. Moreover, the court of appeals found that evidence of petitioners' partici-

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[4]While there appears to be disagreement among the courts of appeals as to the formulation of the standard for admissibility of co-conspirator statements (compare *United States* v. *Morton*, 483 F. 2d 573 (C.A. 8); *United States* v. *Spanos*, 462 F. 2d 1012 (C.A. 9); *United States* v. *Martinez*, 466 F. 2d 679 (C.A. 5), with *United States* v. *Bey*, 437 F. 2d 188 (C.A. 3); *Carbo* v. *United States*, 314 F. 2d 718 (C.A. 9), certiorari denied, 377 U.S. 953; *United States* v. *Geaney*, *supra*), the present case is not an appropriate vehicle for resolution of this conflict, because the admission of Burdieri's statement against petitioners D'Amato and Zito was proper under the most stringent standard of admissibility, and its admission against petitioner Abramo, even if errorneous, was harmless. The only statement admitted under the co-conspirator exception to the hearsay rule was Burdieri's statement to Agent McElroy that he was going to meet "his people" (Abramo Pet. App. A 9a). This statement was merely cumulative of the independent evidence (*i. e.*, testimony of surveilling agents, Burdieri's "verbal acts" and evidence concerning a prior similar transaction) establishing Abramo's participation in the conspiracy, since that evidence made it entirely clear, wholly apart from the statement, that when Burdieri left the car with the money, he was proceeding to attempt to consummate the narcotics transaction with the other persons involved. The only issue as to which the jury could have had any doubt was whether Abramo was a participant in the conspiracy, and the statement adds little, if anything, to the other evidence bearing on that question.

We also submit, as we did in the court of appeals, that Burdieri's statement was admissible as a "verbal act" probative of intention without regard to the co-conspirator exception to the hearsay rule. See *United States* v. *Annunziato*, 293 F. 2d 373 (C.A. 2), certiorari denied, 368 U.S. 919.

pation in the conspiracy was strengthened when Burdieri's verbal acts —"contemporaneous utterances explaining non-verbal conduct or its tenor"—were considered. The court noted that such "verbal acts" are not hearsay, since they are not introduced to establish the truth of the matter asserted in the statements. Not being hearsay, they may properly be considered in determining whether the *Geaney* test has been satisfied.

Once petitioners' participation was established by a preponderance of evidence independent of hearsay evidence, Burdieri's statements were admissible against petitioners under the co-conspirator exception to the hearsay rule. See, *e.g., Wong Sun* v. *United States,* 371 U.S. 471, 490; Developments in the Law, *Criminal Conspiracy, 72 Harv. L. Rev. 920, 922-923 (1959).*

Petitioners contend, however, that the admission of Burdieri's statements constituted error under this Court's decision in *California* v. *Green,* 399 U.S. 149, and *Dutton* v. *Evans,* 400 U.S. 74. To the extent that petitioners contend that the co-conspirator exception to the hearsay rule is invalid, such a contention finds no support in either *Green* or *Dutton.* Indeed, in *Dutton* this Court expressly stated that it did not question the validity of the co-conspirator exception to the hearsay rule (400 U.S. at 80). Petitioners' invocation of the Confrontation Clause of the Sixth Amendment is equally unavailing. Although admissibility under the hearsay rules is not conclusively determinative of a claim under the Confrontation Clause, this Court has noted that the two "stem from the same roots" (400 U.S. at 86). The policies underlying the hearsay rules are relevant to the Confrontation Clause inquiry. In the present case,

the admissibility of those co-conspirator statements is strengthened by the fact that Burdieri's statements were declarations against his own penal interest. In *Dutton* this Court recognized that such declarations reflect one of the "indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant." 400 U.S. at 89.

4. Petitioners' final contention is that they were denied a fair trial because one of the jurors was claustrophobic. In considering this contention, the court of appeals correctly found (Abramo Pet. App. A 12a):

> After verdicts had been returned as to all appellants on all counts except with respect to Zito on count two, it was determined by the court that one of the jurors was unable to continue. The juror had in fact previously experienced some discomfort, and indeed had been sent to a hospital where the problem was diagnosed as an acute attack of claustrophobia. The court had, however, taken steps to alleviate the the strain on the juror; and when the point was reached that the juror could not continue further, a full and most careful examination of that juror and the jury by the court, App. 735a-68a, made it abundantly clear that the claustrophobia had not "adversely affected the challenged juror's ability to decide [the] case intelligently." *United States* v. *Silverman,* 449 F. 2d 1341, 1344 (2d Cir. 1971, *cert. denied*, 405 U.S. 918 (1972)), at least with respect to the verdicts already returned. There was therefore no prejudice to any defendants on those counts. Appellant Zito argues on appeal, citing no authority, that the failure of the jury to return a

verdict as to him on count two required dismissal of that count rather than a mistrial as directed by the court below. But appellant Abramo's brief correctly states the law, which is that a new trial—following the declaration of a mistrial—is the appropriate outcome where a juror has been disqualified. See *Parker* v. *Rattenni,* 480 F. 2d 195 (2d Cir. 1973).

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.